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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 30

THE KLAMATH AND MOADOC TRIBES AND YAHOOSKIN BAND OF SNAKE INDIANS,
Petitioners,

v.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR PETITIONERS.

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BRIEF FOR PETITIONERS.

Opinion Below.

The amended special findings of fact and conclusion of law and opinion of the Court of Claims are to be found at pages 18-41 of the record. The opinion has not yet been officially reported.

Jurisdiction.

The jurisdiction of this Court is invoked under § 3 (b) of the Act of Congress approved February 13, 1925, c. 229, 43 Stat. 936, 939.

The case was first decided November 5, 1934. R. 18. On November 24, 1934, plaintiffs moved for a new trial and to amend the special findings of fact, and on November 28,

1934, the defendant moved to amend the special findings of fact. R. 18.

On April 8, 1935, an order was entered overruling the motion for a new trial and allowing in part and overruling in part the motions to amend the findings, R. 18, and on the same day judgment was entered dismissing the petition. R. 41.

Question Presented.

The primary question is whether the claim of the Indians of the Klamath Reservation in Oregon (hereafter called the Klamath Indians or the Klamath Tribes) for just compensation for land taken from them under authority of an act of Congress, and worth at the time, as found by the Court of Claims, $2,980,000, comes within the scope of the jurisdictional act, or whether the claim is barred by acceptance of a payment of $108,750 and the signing of a release by 150 adult male members of the Tribes out of a total adult membership of 640 (287 men and 353 women) without the authorization of a general council of the members of the Tribes.

Statutes and Treaty.

The Act of May 26, 1920, c. 203, 41 Stat. 623, herein referred to as the jurisdictional act; the part of the Act of June 21, 1906, c. 3504, 34 Stat. 325, 368, authorizing the taking of the lands in question; the part of the Act of April 30, 1908, c. 153, 35 Stat. 70, 92, appropriating the $108,750; and the Treaty of 1864 between the United States and the Klamath Tribes, 16 Stat. 707, are printed as an appendix. *Post*, 56-67.

Statement of the Case.

In 1864 the Klamath Tribes held by immemorial possession over 20,000,000 acres of land in what are now the States of Oregon and California. Their title was not disputed. Finding II, R. 21.

In that year they ceded these lands to the United States by Treaty, 16 Stat. 707, *post*, 60, reserving however for their exclusive use and occupancy a specified area, Art. I, which came to be known as the Klamath Indian Reservation. Finding IV, R. 21.

Thereafter, in executing grants of land by Congress in aid of the construction of a road across the State of Oregon, the Department of the Interior erroneously issued patents to the Oregon Central Military Road Company for 111,385 acres within the admitted boundaries of the Klamath Indian Reservation. Findings V, VI, R. 21-22.

Pursuant to an act of Congress approved March 2, 1889, c. 377, 25 Stat. 850, the Attorney General brought suit to recover the 111,385 acres, charging that the patents had been obtained by fraud, but the suit was unsuccessful, the lands having passed to a purchaser in good faith, the California & Oregon Land Company. Finding VII, R. 22.

The 111,385-acre tract was located in a part of the Reservation that had been allotted to members of the Tribes in severalty, Finding VII, R. 23, and they complained "bitterly," Finding VIII, R. 23.

By an act approved March 3, 1905, c. 1460, 33 Stat. 1033, Congress directed the Secretary of the Interior to ascertain the value of these lands, and also for what price the California & Oregon Land Company would convey them back to the United States, or on what terms it would exchange them for other lands within the Reservation not theretofore allotted to individual members of the Tribes.

Eventually, on July 26, 1906, under authority of the beforementioned act of June 21, 1906, c. 3504, 34 Stat. 325,

368, the Secretary of the Interior, without the knowledge or consent of the Tribes, concluded an agreement with the California & Oregon Land Company under which the 111,385-acre tract was conveyed back to the United States in exchange for 87,000 acres of "immensely valuable timber lands in another section of the Reservation." Finding X, R. 24; Opin., R. 31.

As before stated, in 1906 the value of the 87,000-acre tract to the Tribes, under the title possessed by them, was $2,980,000, as found by the Court of Claims. Finding XI, R. 24.

By the Act of April 30, 1908, c. 153, 35 Stat. 70, 92, Congress appropriated $108,750 to be deposited in the Treasury to the credit of the Tribes upon the execution by them, "through the usual channels," of a release "of any claims and demands of every kind against the United States for the land involved." Finding XIII, R. 25.

No release was ever authorized or approved by any tribal action. While a general council of the members of the Tribes was called by the Superintendent of the Reservation to consider the matter, opposition developed, and no vote was taken. Findings XV, XVI, R. 25-26.

However, a release was signed at different times by 150 adult male members of the Tribes, Findings XVI, XVII, XVIII, R. 26, out of a total adult Indian population of 640, of whom 287 were men and 353 women, Finding XV, R. 25. This was accepted by the Secretary of the Interior as a "sufficient" compliance with the Act of April 30, 1908, Finding XIX, R. 27, and thereupon the $108,750 was deposited in the Treasury to the credit of the Tribes, Finding XIX, R. 27.

The Indians testified without contradiction that they "relied upon the fairness of the United States to pay what the lands were worth to them, and acted without knowledge of the true value of the same, believing that failure to as-

sent meant a loss of the money and the lands as well." Opin., R. 40.

On May 26, 1920, Congress passed the jurisdictional act, c. 203, 41 Stat. 623, *post*, —, authorizing the Court of Claims to hear "all claims of whatsoever nature which the Klamath and Moadoc Tribes of Indians and the Yahooskin Band of Snake Indians * * * may have against the United States, which have not heretofore been determined by the Court of Claims, * * * for determination of the amount, if any, due said Indians from the United States

> "under any treaties, agreements, or laws of Congress, or
> "for the misappropriation of any of the funds of said Indians, or
> "for the failure of the United States to pay said Indians any money or other property due; * * *." § 1.

It was further provided that the rights of the parties shall be determined "notwithstanding lapse of time or statutes of limitation," and that "any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset * * *," and that "the United States shall be allowed credit for all sums, including gratuities, heretofore paid or expended for the benefit of said Indians or any band thereof." § 2.

Pursuant to this statute the present suit was brought to recover money due the Klamath Tribes as just compensation for the taking of the 87,000 acres of their lands, deducting, of course, the $108,750 already received. R. 1-17.

The Court of Claims held the release to be a bar and dismissed the suit. Opin., R. 33, 36-37, 41.

Specification of Errors.

The Court of Claims erred

1. In holding the claim sued upon to be not within the jurisdictional act.

2. In holding the alleged release to be a bar.

3. In construing and applying the jurisdictional act in respect of items of set-off claimed by the United States on account of expenditures as follows: for administration, enforcement of the laws and police, including agency buildings, incidental agency expenses, and pay of Indian agents, interpreters, judges of the Indian courts, and miscellaneous employees, and pay and equipment of Indian police; for erection and repair of a sawmill; for Indian school and agency buildings; for transportation by carrier; and for education of children of the Tribes at schools off the Reservation.

Summary of Argument.

I. The jurisdictional act, in authorizing the Court of Claims to hear "all claims of whatsoever nature which the Klamath etc. Indians • • • may have against the United States, • • • for the failure of the United States to pay said Indians any money or other property due," § 1, with the *one* exception of claims "which have not heretofore been determined by the Court of Claims," § 1, and in further providing that "any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel," § 2, removed the bar of the alleged release and opened the way for the determination of the present claim on the merits.

This construction is confirmed by the legislative history. Any other construction would render meaningless the provision that "any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel."

II. In any event the alleged release was never binding upon the Klamath Tribes.

First, authority to bind an Indian tribe in the disposition of tribal property is vested in the body of the members in general council assembled. This release was not author-

ized, approved or ratified at any general council of the Klamath Tribes. Second, the members of the Tribes who signed it as individuals did so under duress. Finally, the plain inadequacy of the consideration for the release, taken in connection with the unequal positions of the parties, was enough without more to invalidate it.

III. As the taking of the Indians' property in the 87,000 acres was done under authority of an act of Congress, they are entitled to just compensation as for a taking under the power of eminent domain, i. e., the value of their property at the date of the taking plus interest from that date to the date of payment.

The provision of § 3 of the jurisdictional act limiting the damages for the appropriation of Indian land "to the value of the said land at the time of said appropriation," is by its own terms applicable only to land "wrongfully appropriated." Land taken under authority of an act of Congress in the exercise of a constitutional power is not *wrongfully* appropriated. Besides, even if the meaning of the provision were doubtful it should be construed so as not to violate a constitutional right.

IV. Expenditures by the United States in fulfillment of treaty obligations, and expenditures not made "for the benefit of said Indians or any band thereof," are not chargeable against the Indians under the jurisdictional act. The Court of Claims allowed the United States set-offs not authorized by the jurisdictional act, namely, expenditures for administration, enforcement of the law and police, for Indian school and agency buildings, for erection and repair of a sawmill, and for transportation by carrier,—all expenditures made in fulfillment of treaty obligations; also, expenditures for education of selected children of the Tribes at schools off the Reservation, which were not "for the benefit of said Indians or any band thereof" within the meaning of the jurisdictional act.

The Argument.

Point I.

The jurisdictional act removes the bar of the alleged release and reopens the claim for determination on the merits.

1. The jurisdictional act submits to the Court of Claims "all claims of whatsoever nature which the Klamath Indians * * * may have against the United States, *which have not heretofore been determined by the Court of Claims,* * * * for determination of the amount, if any, due said Indians from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds of said Indians, or for the failure of the United States to pay said Indians any money or other property due," § 1, with power "to hear and determine all legal and equitable claims, if any, of said Indians, against the United States, and to enter judgment thereon," § 1, "notwithstanding lapse of time or statutes of limitation, *and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel,* but may be pleaded as an offset * * *," § 2. [Italics ours.]

Thus, with the one exception of claims heretofore determined by the Court of Claims, the act covers "all legal and equitable claims, if any, of said Indians, against the United States," and in making that specific exception Congress itself has recognized that the description of the claims authorized to be submitted was so comprehensive as to admit of no exception unless expressly made.

If Congress had intended to except claims heretofore settled or purported to have been settled by agreement between the parties as well as by determination of the Court of Claims it must be presumed that it would have been equally explicit in saying so.

It is indeed a "well known maxim," as stated by Mr. Justice Story in *Bend* v. *Hoyt*, 13 Pet. 263, 271-272, 10 L. ed. 154, 158, "that an exception in a statute amounts to an affirmation of the application of its provision to all other cases not excepted."

2. In addition, the jurisdictional act expressly provides that—

> "*any* payment which may have been made upon any claim so submitted *shall not be pleaded as an estoppel*, but may be pleaded as an off-set • • •." § 2 [Italics ours.]

Unless this clause shall be construed as applicable to a payment made and accepted at the time as payment in full it would mean nothing, since, of course, in no event would acceptance of a partial payment operate as an estoppel.

The reasoning of the Court below as to the effect of this clause, R. 35-36, is hard to follow.

On the one hand it concedes that the clause "is not meaningless," R. 35, that it has "some remedial purpose," R. 35; but the conclusion reached is that the clause does not "preclude the United States from proving that a payment made discharged the liability," R. 36, that it "did [does] not refer to a settlement, • • • but to an outstanding claim," R. 36.

If the clause does not apply to a payment in settlement or discharge of a claim, in other words, if it applies only to payments on account, then it *is* meaningless, because, of course, it would have been unnecessary to provide that acceptance of a payment on account should not operate as an estoppel.

In another place the Court undertakes to answer the argument that the clause would be meaningless unless applicable to a payment on a claim made and accepted in discharge of all liability by attempting to draw a distinction

between such a payment when accompanied by a formal release and when not, implying that the clause would apply in the latter case but not in the former. R. 36.

There is nothing in the language of the clause which purports to make its operation depend upon any such distinction. Besides, no such distinction exists. Let it once be established by competent evidence of any kind that a payment upon a claim was made and accepted in full settlement and the payment operates as a discharge just as much as if a formal release had been executed. It is a question of intention, not method of proof. *Dodge* v. *Freedman's Savings & Trust Co.*, 93 U. S. 379, 387, 23 L. ed. 920, 923; *Luckenbach* v. *McCahan Sugar Ref. Co.*, 248 U. S. 139, 149, 63 L. ed. 170, 176.

The opinion below also observes that, "A settlement and release of a claim is something different in law from a 'payment upon a claim.'" R. 36. But that, as just shown, depends upon the intention of the parties, i. e., whether the payment was made and accepted as a payment in full.

3. The jurisdictional act contains further evidence within itself of the purpose of Congress to reopen all claims of the Klamath Indians for determination on the merits. That is, it provides that "the United States shall be allowed credit for all sums, including gratuities, heretofore paid or expended for the benefit of said Indians," and it waives defenses based on "lapse of time or statutes of limitation." § 2.

Except in return for a reopening of the claims of these Indians for adjudication on the merits, it is unthinkable that Congress would have taken back everything the United States had ever given them at any time as a condition of allowing them to sue the United States to recover money the United States owed them.

In other words, the evident purpose—putting out of view claims already adjudicated by the Court of Claims—was to

arrive at a just settlement *de novo*, forestalling all pleas in bar based on estoppel or limitations on the one side or on the irrevocability of absolute gifts on the other.

4. If the language of the jurisdictional act had left the matter in any doubt, which, as we think, it does not, the doubt would be removed by the Reports of the Committees on Indian Affairs of the House of Representatives and the Senate recommending the passage of the act. H. Rep. No. 672, 66th Cong., 2nd sess.; S. Rep. No. 548, 66th Cong., 2nd sess.

While the act is not limited to any specific claim or claims, in pressing for its passage the spokesmen for the Indians concentrated upon a long-standing claim growing out of a boundary controversy. *Ibid.*

In an act approved June 10, 1896, c. 398, 29 Stat. 321, 342, Congress had taken cognizance of a claim of the Klamath Indians that by an erroneous survey they had been deprived of lands within the boundaries of their Reservation as defined in the Treaty of October 14, 1864, 16 Stat. 707, and authorized the President to appoint a commission to determine the correct location of the boundaries acording to the terms of the Treaty. Later in the same year, 1896, the Commission made a report determining the boundaries of the Reservation in accordance with the terms of the Treaty, and finding that a large area had been excluded from the Reservation by an erroneous survey of the boundaries in 1871. H. Rep. No. 672, 66th Cong., 2nd sess., p. 7.

Thereafter, under authority of an act of Congress approved July 1, 1898, c. 545, 30 Stat. 571, 592, the Secretary of the Interior concluded an agreement with the Indians dated June 17, 1901, subject to ratification by Congress, in which the Indians ceded to the United States the land found to have been excluded from the Reservation by the errone-

ous survey, 621,824 acres, Art. I, H. Rep. No. 672, 66th Cong., 2nd sess., pp. 8, 19, and the United States, in consideration therefor, agreed to pay them $537,007.20, "*in full of all claims and demands of said Klamath and other Indians arising or growing out of the erroneous survey of the outboundaries of their Reservation in* 1871," Art. II, Ibid., pp. 19-20. [Italics ours.]

This agreement was set forth and ratified in an act of Congress approved June 21, 1906, c. 3504, 34 Stat. 325, 367-368, and the sum of $537,007.20 was appropriated to be paid the Indians in accordance with its terms, 34 Stat. 368.

Here then was an agreement between the Klamath Indians and the United States, entered into with all the formalities of a treaty, in full settlement of all claims growing out of the boundary dispute.

Now, as before stated, these were the claims most urged when the jurisdictional act was under consideration, and chief among the claims set forth in the Report of the House Committee on Indian Affairs as the occasion for recommending passage of the act, H. Rep. No. 672, 66th Cong., 2nd sess., pp. 7-15, *and the Committee not only knew of the settlement agreement of June* 17, 1901, *but copied it in full in its Report, Ibid.,* pp. 8, 13, 19. The bill having passed the House, it was reported favorably by the Senate Committeee on Indian Affairs, with a reference to the Report of the House Committee, S. Rep. No. 548, 66th Cong., 2nd sess., so that the Senate Committee also had knowledge of the settlement.

So, we repeat, if the language of the jurisdictional act had left the matter in any doubt, the legislative history makes it clear beyond question that Congress intended the act to include claims which had been the subject of prior settlement agreements between the Indians and the United States as well as unsettled claims.

It was suggested in the Government's brief in opposition to the petition for certiorari that all that the legislative history shows is that Congress intended to permit the settlement agreement of 1901 to be *construed*, not reopened. But as the agreement expressly provided that the payment made was "in full of all claims and demands of said Klamath and other Indians arising or growing out of the erroneous survey of the outboundaries of their reservation in 1871," it is clear that the Court must go behind the settlement, and not merely construe it, in order to adjudicate the boundary claim.

5. In *Choctaw Nation* v. *United States*, 119 U. S. 1, 30 L. ed. 306, the Act of Congress of March 3, 1881, under which the suit was brought, authorized the Court of Claims "to take jurisdiction of and try all questions of difference arising out of treaty stipulations with the Choctaw Nation, and to render judgment thereon," with power "to review the entire question of differences *de novo*." 119 U. S. 2, 30 L. ed. 306. One group of claims asserted in the suit was for failure of the United States fully to perform its obligations under Article 14 of the Treaty of 1830. 119 U. S. 5, 30 L. ed. 307. However, the Choctaws had previously received from the United States a payment of $872,000 in respect of these claims, and had executed, as the Act of Congress appropriating the money required, "a final release" of such claims, and the United States, just as in the present case, pleaded this release in bar on the theory that only *unsettled* claims came within the jurisdictional act. 119 U. S. 14-15, 26, 43-44, 30 L. ed. 310-311, 314, 320. As in the present case, the Court of Claims sustained the plea, 21 Ct. Cl. 59, 71, 101-104, but this Court reversed the decision, saying:

> "Under the terms of the Act of March 3, 1881, in exercising the jurisdiction thereby conferred, the Court

> of Claims is empowered to review the entire question of differences *de novo*, which may be interpreted to imply that the whole matter was opened from the beginning, with the view of determining what the original treaty rights of the Choctaw Nation were, and how far they have been performed by the United States in its various transactions with them, including the acts done under the authority of the statutes referred to." 119 U. S. 29, 30 L. ed. 315.

The jurisdictional act in the present case is equally broad. Power to hear and determine "all claims of whatsoever nature * * * for the failure of the United States to pay said Indians any money or other property due," coupled with a waiver of the defenses of estoppel and limitations, *ante*, 9, is the equivalent of power "to review the entire question of differences *de novo*."

In *Iowa Tribe of Indians* v. *United States*, 68 Ct. Cl. 585, the jurisdictional act authorized to be submitted thereunder "the claims of the Iowa Tribe of Indians, of Oklahoma, against the United States," for adjudication of "the amount, if any, which may be legally or equitably due said tribe * * * under any stipulations or agreements, whether written or oral, * * * or for the failure of the United States to pay any money which may be legally or equitably due said tribe of Indians." Pp. 602, 603.

These Indians, by an agreement in writing, ratified by Act of Congress, had "surrender[ed] and relinquish[ed] to the United States all their right, title, claim and interest in and to and over" certain lands for specified considerations. P. 589. Subsequently they asserted a right to additional compensation on the ground that the written agreement did not express the actual agreement as understood by them. Notwithstanding their prior relinquishment of all claims to the lands this claim was held to come within the jurisdictional act. Citing the *Choctaw Nation Case*, the Court of Claims observed that in that case—

"the Supreme Court, speaking of a special *jurisdictional act similar in its scope to the present one,* held that the act operated to reopen in its entirety the claims of the Choctaws growing out of a series of treaties as well as an award made by the Senate." P. 607. [Italics ours.]

The jurisdictional act in the case of the Iowa Tribe of Indians is at least no broader than that in the present case, so that if the former is "similar in its scope" to the jurisdictional act in the *Choctaw Nation Case* the same must be true of the latter. Indeed, the provision in the jurisdictional act in the case of the Iowa Tribe of Indians which the Court of Claims singled out as especially comprehensive, namely, that conferring jurisdiction to adjudicate claims "for the failure of the United States to pay any money which may be legally and equitably due said tribe of Indians," p. 606, is found almost word for word in the jurisdictional act in the present case, § 1.

In *Fort Berthold Indians* v. *United States,* 71 Ct. Cl. 308, 337, the Court of Claims again took cognizance, under a jurisdictional act practically identical with that in the present case, of a claim which had been previously settled.

6. In *Creek Nation* v. *United States,* 63 Ct. Cl. 270, cited in the Court below, the jurisdictional act was limited to claims "arising under or growing out of any treaty or agreement," 63 Ct. Cl. 270, and the ground of the decision was that a claim which had been settled by an agreement was not a claim *arising under or growing out of an agreement.* 63 Ct. Cl. 272-273, 274.

Likewise in *United States* v. *Old Settlers,* 148 U. S. 427, 37 L. ed. 509, cited by the Court below as inhibiting it "from adjudicating any Indian claims depending for their validity upon the setting aside or abrogation of any article of a

treaty," the jurisdictional act was limited to claims "arising from or growing out of treaty stipulations and acts of Congress relating thereto," 148 U. S. 428, 37 L. ed. 510, and all that was decided was that a claim which could only be asserted by *disregarding* a treaty could not be said to be a claim *arising under or growing out of* a treaty. 148 U. S. 469, 37 L. ed. 524-525. Furthermore, the jurisdictional act there did not waive the defense of estoppel. In *Sisseton and Wahpeton Bands of Sioux Indians* v. *United States*, 277 U. S. 424, 72 L. ed. 939, also, the jurisdictional act was limited to claims "under any treaties or laws of Congress," and there was no provision waiving the defense of estoppel.

Here, on the other hand, the jurisdictional act extends to "all claims of whatsoever nature which the Klamath etc. Indians • • • may have against the United States," not only *under* any treaty or agreement or act of Congress, but "for failure of the United States to pay said Indians any money or other property due," excepting only claims heretofore determined by the Court of Claims. The difference was pointed out by the Court of Claims itself in *Iowa Tribe of Indians* v. *United States*, 68 Ct. Cl. 585, 606.

To say that no money was due on the present claim because the Indians had accepted the $108,750 in full payment and given a release is to ignore again the provision that "any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel." If we are right that by virtue of that provision acceptance of the $108,750 by the Indians in full payment cannot be set up against them as an estoppel, *ante*, 9, the difference between what was just compensation under the Constitution for the 87,000 acres and the $108,750 already paid is just as much money due the Indians as if the release had never been given.

7. It is unavailing to argue, as the Government did below and in its brief in this Court in opposition to the petition for certiorari, that there are fifteen other similar acts of Congress and that to give them the effect claimed for this one would reopen many settlements between the Indian tribes and the United States.

For the choice between perpetuating an unconscionable settlement with an Indian tribe and suffering the inconvenience of reopening a claim for determination on the merits is one for Congress to make in each case as it arises, and in the present case, as shown above, Congress has left no room for doubt as to its intention.

Besides, there is nothing before the Court to show what settlements with other tribes might be affected by construing the jurisdictional act in the present case as reopening claims of the Klamath Indians for determination on the merits; nor to what extent the reopening of settlements with other tribes might be limited by the language of the particular jurisdictional act. Thus, of the fifteen other jurisdictional acts referred to by the Government ten, listed below,[1] are limited to claims *arising under or growing out of* any treaty or agreement or act of Congress, as in the case of *Creek Nation* v. *United States*, 63 Ct. Cl. 270, *ante*, 15.

Certainly there is no substance in the suggestion that the construction we are contending for would mean the reopening of all treaties or agreements under which payments of money have been made to the several tribes named in these

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[1] Acts of March 19, 1924, c. 70, 43 Stat. 27; May 20, 1924, c. 162, 43 Stat. 133; May 24, 1924, c. 181, 43 Stat. 139; June 7, 1924, c. 300, 43 Stat. 537; June 7, 1924, c. 335, 43 Stat. 644; March 3, 1925, c. 459, 43 Stat. 1133; July 2, 1926, c. 724, 44 Stat. 801; July 3, 1926, c. 734, 44 Stat. 807; March 2, 1927, c. 250, 44 Stat. 1263; March 3, 1927, c. 302, 44 Stat. 1349.

jurisdictional acts, including treaties or agreements for the cession of lands. The language of the statute is "any payment • • • upon any *claim* • • • shall not be pleaded as an estoppel." A claim arises only when violation of a right is asserted. Payment of the agreed price for a voluntary cession of lands or rights is not, in the nature of things, a payment upon a *claim*.

Point II.

In any event the alleged release was never binding upon the Klamath Tribes, first, because not the act of the Tribes; second, because signed under duress; and third, because the plain inadequacy of the consideration taken in connection with the unequal positions of the parties was enough without more to invalidate it.

First. The alleged release was not the act of the Klamath Tribes and therefore was ineffectual to surrender any rights or claims of the tribes.

1. As regards *tribal* rights of property, an Indian tribe is not bound, of course, by the acts of individual members holding no authority to represent the tribe. Authority to bind the tribe in such matters is vested in the members in *general council assembled. Choctaw Nation* v. *United States*, 119 U. S. 1, 18-19, 30 L. ed. 306, 312; *Pueblo of Santa Rosa* v. *Fall*, 273 U. S. 315, 317-318, 319-320, 71 L. ed. 658, 659, 660.

In the case last cited this Court decided that a deed to lands belonging to an Indian village executed by the captain of the village for himself and inhabitants of the village was void because its execution had not been authorized by the Indians "in council." 273 U. S. 317-318, 319-320, 71 L. ed. 659, 660. There is no essential difference between the juridical status and characteristics of an Indian pueblo or village and an Indian tribe. *United States* v.

Chavez, 290 U. S. 357, 361, 78 L. ed. 360, 362; *United States* v. *Candelaria*, 271 U. S. 432, 439-440, 70 L. ed. 1023, 1025-1026; *United States* v. *Sandoval*, 231 U. S. 28, 58 L. ed. 107.

The acts of Congress also recognize the general council as the proper authority to bind an Indian tribe in the disposition of tribal property. As stated in the opinion below:

> "The United States in negotiating treaties assembled councils, and the statutes of the United States disclose repeated acts of Congress referred for ratification to Indian councils. In later times the Indian council has developed into more settled and established forms of procedure, and the United States, in the matter of legislation affecting Indian lands and funds, has proceeded largely upon the rule of obtaining the assent of the Indians to the legislation enacted." R. 39.

The Klamath Indians were no exception:

> "The Indians on the Klamath Reservation met in councils. They were called together in some instances upon their own motion, and upon other occasions by the superintendent of the agency." R. 39.

As an example, the Act of March 4, 1933, c. 275, § 1, 47 Stat. 1568, relating to the modification of contracts for the sale of timber on Indian lands, requires "the consent of the Indians involved, expressed through a regularly called general council," and in particular it provides as to the Klamath Indians that "no contract of sale of Indian timber on the Klamath Indian Reservation in Oregon shall be entered into without the consent of the said general council."

So, also, administrative practice recognizes the general council as the source of authority in such matters, as shown by the instructions of the Commissioner of Indian Affairs to the Superintendent of the Klamath Reservation to call a general council to pass upon the transaction in the pres-

ent case,[1] and by the calling of such a council by the Superintendent "to assemble at the general agency headquarters on December 5, 1908, for the purpose of considering compliance with the Act of April 30, 1908," Finding XV, R. 26.

The Act of April 30, 1908, appropriating $108,750 to be paid the Tribes of the Klamath Reservation in settlement of their claims growing out of the taking of the 87,000-acre tract did not authorize any departure from this method of binding an Indian tribe in the disposition of tribal property. On the contrary it expressly provided for a release "through the usual channels," 35 Stat. 92.

That the Commissioner of Indian Affairs understood this to mean a release assented to by the Indians in general council and not individually is shown not only by his beforementioned instructions to call a general council but by the form of release supplied by his office, which provided, "Now, therefore, the undersigned, being a majority of the Indians of the Klamath Reservation *in council assembled;* do hereby relinquish etc., etc." Findings XIV, XVIII, R. 25, 27. [Italics ours.]

As the law does not define a general council it must be assumed that the references to a general council in the decisions of the Courts and acts of Congress and administrative practice mean a general council organized and conducted in accordance with established tribal custom.

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[1] Letter dated September 8, 1908, Exhibit 84, reply of Department of Interior to plaintiffs' call: "• • • the office has always required such instruments to be executed by a majority of the tribe. • • • You will therefore call the Indians in general council, at such time as may be most convenient, and have them execute the release as directed in Office Letter of July 14, 1908." This letter was not incorporated in the findings but there is no dispute as to its authenticity.

2. The release here was *not* assented to by the Klamath Tribes in council assembled.

All that the findings of fact show is that the members of the Tribes were notified to assemble at the agency headquarters on December 5, 1908, for the purpose of holding a general council to consider acceptance of the provisions of the Act of April 30, 1908, Finding XV, R. 25-26; that "200 or more" Indians responded and the Superintendent of the Reservation explained the matter, Finding XVI, R. 26; that some opposition developed but in the end the release was signed by "100 or more" of the Indians present, Finding XVI, R. 26; that additional signatures were obtained at a subsequent meeting in another part of the Reservation of Indians who seldom attended general councils at the agency headquarters, Finding XVII, R. 26; and that the release was signed by 150 adult male[1] members of the Tribes, in all, Finding XVII, R. 26, out of a total adult membership of 640—287 men and 353 women, Finding XV, R. 25.

The 150 did not all sign, however, at these two meetings. Nor is it so stated in the findings. Fearing that such might be inferred from the context, the petitioners requested a clarification of the findings on this point, citing the testimony of the Superintendent himself that some signed at

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[1] The finding that, "The adult males were alone allowed to vote in Indian councils," Finding XV, Rec. 25-26, we challenge as a matter of law, because without any supporting evidence. See *Hathaway & Co.* v. *United States*, 249 U. S. 460, 463, 63 L. ed. 707, 708; *William Cramp & Sons* v. *United States*, 239 U. S. 221, 232, 60 L. ed. 238, 243; *United States* v. *Clark*, 96 U. S. 37, 24 L. ed. 696. However, assuming it to be true, a majority of the adult male members of the Tribes of the Klamath Reservation never voted in favor of the alleged release at any general council of the Tribes, as will appear.

other times and places. To this the respondent replied that "the Court did *not* find that the 150 signatures were obtained at the two meetings."[1] [Italics ours.]

The parties being in agreement as to the meaning and effect of the findings on this point, the wording was not changed.

Thus, of the 150, an unknown number signed at other times and places. As the total adult male membership was 287, it follows that the findings do not show that the release was signed at the two meetings by a majority of the adult male members, much less by a majority of all the adult members.

Nor do the findings show how a general council of an Indian tribe is organized and its proceedings conducted, and necessarily therefore they do not show whether these meetings either in method of organization or method of procedure met the requirements of a general council.

Nor do they show any vote of the meetings on the proposed release.

The petitioners asked the Court below to find, in accordance with the uncontradicted evidence, oral and documentary, that a general council of the Tribes of the Klamath Reservation is a meeting, pursuant to call, of the members of the Tribes, who thereupon organize by electing from their own number a chairman and a secretary; that questions are submitted and votes taken and minutes of the proceedings kept; that at the meetings here in question no chairman was elected, and no secretary; that there was opposition to the proposal to accept the $108,750 in settlement of the claims growing out of the taking of the 87,000-acre tract and no vote was taken on that proposal or on any other matter;

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[1] Defendant's Objections to Plaintiffs' Motion for New Trial and to Amend the Special Findings of Fact and to Make Additional Ones, p. 5.

and that no minutes of the proceedings were taken down or kept. They also requested to have incorporated in the findings the minutes of the proceedings of several prior general councils of the Klamath Indians, produced from the records of the Department of the Interior, to show exactly how a general council of the Klamath Indians is organized and conducted.

The defendant objected to these requests on the ground of immateriality, and the Court denied them, saying:

> "The failure to observe the details of procedure previously followed by the Indians in conducting a council is not fatal." R. 40.

But electing their own presiding officer by the members of a tribe assembled to hold a general council, and debating and taking votes in the presence of each other, with a secretary to record the votes and proceedings, are not mere details of procedure. They are the means of assuring a free and accurate expression of the tribal will. They are what make a general council. Not *every* meeting of the members of a tribe is a general council.

While lack of findings on these points restricts the argument on this branch of the case it does not seem necessary to ask that the case be remanded for additional findings.

For the burden of establishing the validity of a release of a claim by dependent persons like seamen or Indians rests on the party relying upon it—in this case the Government. *Brown* v. *Lull,* Case No. 2018, 4 Fed. Cas. 407, 409-410, Story, J.; *Harden* v. *Gordon,* Case No. 6047, 11 Fed. Cas. 480, 485, Story, J.; *Harmon* v. *United States,* 59 F. 2d 372, 373, C. C. A. 5th.

Therefore, since the assent of the Klamath Tribes expressed in a general council organized and conducted in accordance with established practice was essential to the validity of the release in the present case, *ante,* 18-20, and

since the findings do not show such assent, the release must fail as a defense.

But waiving the point that the findings do not show that either of the two meetings was organized as a general council of the Klamath Tribes, and assuming that the established methods of conducting the business of a general council may be dispensed with so long as the will of a majority is indicated in *some* manner, as, for example, by signing a paper; in short, assuming that signing the release at either of the meetings was the equivalent of voting for it in general council, and assuming further, as claimed by the Government, that a majority of the adult *male* members of a tribe can bind it in general council, the release in question must still fail as a defense because, as pointed out above, *ante*, 21, the findings do not show that it was signed at either of the meetings or at the two together by a majority of the adult male members of the Klamath Tribes. And, as before stated, one pleading a release of a claim by a dependent person like an Indian has the burden of establishing its validity. *Ante*, 23.

The release must also fail as a defense even though the Government should argue, contrary to the position of the Indian Office, *ante*, 20, that the requirements would be met if the release were signed at the two meetings together by a majority of the Indians *present* and qualified to vote, regardless of whether they constituted a majority of the entire voting membership, because the findings do not show how many were present or how many signed at each meeting.[1]

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[1] This is not the fault of the findings. Neither meeting having been organized or conducted in the manner required of a general council, and no record of the proceedings having been made, it is impossible now to ascertain how many Indians were present or how many signed the release at the meetings.

It follows that the release pleaded in bar was not the act of the Klamath Tribes and hence was ineffectual to surrender tribal property rights.

3. Confronted with the fact that in no possible view of the case can it be maintained that a majority of the Indians of the Klamath Reservation, or even a majority of the adult males, assented to the release in general council, the Assistant Attorney General contended below that no action by the members in general council was necessary in order to make the release binding upon the Tribes.[1]

It has been shown, however, that all branches of the Government recognize the general council as the source of authority to bind an Indian tribe in the disposition of tribal property. *Ante*, 18-20. And the draft of release transmitted by the Indian Office by its terms provided for execution by "a majority of the Indians of the Klamath Reservation *in council assembled.*" *Ante*, 20. [Italics ours.]

As further ground for its contention that the alleged release was binding upon the Klamath Tribes although neither authorized nor ratified by them in general council, the Government cited the acceptance of the release by the Secretary of the Interior as a "sufficient" compliance with the provisions of the Act of April 30, 1908, Finding XIX,

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[1] "The action of a general council on the question of accepting or rejecting the offer of Congress would have availed nothing, because the department held that the release should be signed by a majority of the tribe (R., p. 837). No action of a general council could have satisfied this requirement." Supp. Br., 889.

"Plaintiffs contend that the general council was not organized, that there was no chairman, no secretary, no minutes, and no vote. But since the action of a general council could not effect a release, such formalities were useless." *Ibid.*, 897.

R. 27, and an agreement dated June 17, 1901 (heretofore referred to in another connection), for the cession of certain lands by the Klamath Tribes to the United States, which was executed on the part of the Indians by a majority of the adult males, and which it was said indicated what Congress meant by a release executed "through the usual channels." Government's brief below, pp. 788-790.

If the release was not in law the act of the Klamath Tribes the approval of the Secretary of the Interior could not make it such. Besides, the Secretary's approval was based, it must be assumed, upon the recital in the release that it was signed by "a majority of the Indians of the Klamath Reservation in council assembled," Finding XVIII, R. 27. This statement was incorrect. As shown above, the release was *not* signed by a majority of the Indians nor even by a majority of the male adult Indians of the Klamath Reservation *in council assembled*. *Ante*, 21.

As to the agreement of June 17, 1901[1], before its execution the terms of the agreement, including a provision for its execution on the part of the Indians by a majority of the adult male members, were approved by vote of the Tribes *in council assembled*. H. Doc. No. 156, 56th Cong., 2nd sess., pp. 28-29, 31; H. Doc. No. 79, 57th Cong., 1st sess., p. 1[2]. As a precedent, therefore, this agreement refutes rather than confirms the Government's contention, which

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[1]This agreement was first executed October 29th, 1900. It was revised in a minor particular and re-executed June 17th, 1901. H. Doc. No. 79, 57th Cong., 1st sess., p. 1.

[2]"* * * I assembled the Indians in council on Monday, the 22d instant, at which council there were about 150 Indians, and commenced negotiations for the relinquishment by them of said excluded area, including all claims and demands of said Indians arising or growing out of the erroneous survey of the outboundaries of their reservation in 1871. * * *

overlooks the distinction between the authorization or approval of an act or agreement by a body corporate or politic and the method of execution.

SECOND. THE ALLEGED RELEASE IS INVALID BECAUSE SIGNED UNDER DURESS.

The opinion of the Court of Claims states that some fifty Indian witnesses testified without exception that the Superintendent of the Reservation stated to the Indians in substance "that if they did not accept the $108,750 and execute the release in question, they would lose both the land and money—they would get nothing." R. 39.

The Superintendent did not deny making substantially that statement, but testified that "it was not given in the manner of a threat or anything of that sort, just simply to explain to them that if they wanted that money that they must sign." R., Ct. Cl., 665-666.

The petitioners requested the Court below to find that this statement was made, but the request was ignored.

"* * * I was prepared to conduct negotiations with them in open council, or, what I regarded the better plan, with a committee of three or five members of the tribes, appointed by the Indians assembled, to conduct the negotiations, and after we had reached an agreement we would report it to the full council for its action; * * * In about half an hour they notified me that they had appointed a committee of five persons and were ready to proceed with the negotiations. * * *

"The committee took up only one question at a time and after disposing of it reported to their full council for further instructions. * * * after I had reached an agreement with the committee it was reduced to writing and explained to the Indians assembled, who unanimously concurred in its provisions." Report of United States Indian Inspector McLaughlin, H. Doc. No. 156, 56th Cong., 2nd sess., pp. 28-29.

Whether intended by the Superintendent as a threat or not, the petitioners were entitled to a finding that the statement was made so as to be able to contend as a matter of law that the mere making of it, particularly considering the dependent position of those to whom it was made, constituted duress.

There being no question that the statement was made, it is hoped that if this Court shall deem the statement material the respondent will consent to have the fact that it was made treated as a part of the record for the purposes of the case in this Court, as was done under similar circumstances in *Ceballos* v. *United States*, 214 U. S. 47, 49-50, 53 L. ed. 904, 905, without the necessity of sending the case back for a finding on the subject.

Duress as a legal ground for avoidance of a contract or settlement is a threat which, if carried out, would probably cause injury to person or property for which the remedy afforded by the courts is inadequate. *Hartsville Oil Mill* v. *United States*, 271 U. S. 43, 48-49, 70 L. ed. 822, 827; *Hazelhurst Oil Mill Co.* v. *United States*, 70 Ct. Cl. 334, 352-355. And the United States no less than private parties is subject to the doctrine. *Ibid.*

In *Hartsville Oil Mill* v. *United States*, a settlement of claims against the United States under an existing contract was procured by threats to break the contract if the proffered settlement was not accepted. This Court held that—

> "a threat to break a contract does not in itself constitute duress. Before the coercive effect of the threatened action can be inferred, there must be evidence of some probable consequences of it to person or property for which the remedy afforded by the courts is inadequate." 271 U. S. 49, 70 L. ed. 827.

In *Hazelhurst Oil Mill Co.* v. *United States*, involving a similar settlement induced by a similar threat, evidence

of "probable consequences for which the remedy afforded by the courts is [was] inadequate" was supplied, and accordingly it was held that the settlement was void for duress. 70 Ct. Cl. 351, 352.

If a threat by officers of the Government to break a contract, coupled with a showing of damage if the threat were carried out, for which the remedy afforded by the courts would be inadequate, be duress, for greater reason must it be duress to state to members of an Indian tribe whose property has already been taken from them, and who at the time had no remedy at all in the courts, that if they do not accept in settlement the amount offered they will get nothing.[1]

It follows that the alleged release was signed under duress and therefore is void.

THIRD. THE PLAIN INADEQUACY OF THE CONSIDERATION TAKEN IN CONNECTION WITH THE UNEQUAL POSITIONS OF THE PARTIES WAS ENOUGH WITHOUT MORE TO INVALIDATE THE RELEASE.

For releasing their claim for just compensation for land worth under the title possessed by them $2,980,000 at the time of the taking, the Indians were paid $108,750! Findings XI, XII, XIX, R. 24, 27. So there can be no question as to the inadequacy of the consideration.

Nor can there be any as to the inequality of the positions of the parties. The Indians are "weak and defenseless people who are the wards of the Nation, dependent upon its protection and good faith." *Carpenter* v. *Shaw*, 280 U. S.

[1] It would be a different case if the Superintendent had told the Indians that if they did not sign they would not get any money *at that time* but would have to await further action by Congress. And that was all he need have said in the performance of his duty in the matter.

363, 367, 74 L. ed. 478, 481; *Choate* v. *Pratt*, 224 U. S. 665, 675, 56 L. ed. 941, 946; *Jones* v. *Meehan*, 175 U. S. 1; 11, 44 L. ed. 49, 54; *Choctaw Nation* v. *United States*, 119 U. S. 1, 27-28, 30 L. ed. 306, 315; *United States* v. *Kagama*, 118 U. S. 375, 382, 384, 30 L. ed. 228, 230, 231; *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17, 8 L. ed. 25, 31.

In *Choctaw Nation* v. *United States*, this Court referred to the unequal position of the Indians as follows:

> "The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws." 119 U. S. 28, 30 L. ed. 315.

Where a claim is released for a plainly inadequate consideration by a party occupying a position of inequality the release is void, or, what comes to the same thing, it cannot be pleaded to prevent a determination of the claim on the merits. *Wheeler* v. *Smith, et al.*, 9 How. 55, 13 L. ed. 44; *Thorn Wire Hedge Co.* v. *Washburn & Moen Mfg. Co.*, 159 U. S. 423, 40 L. ed. 205.

This rule applies as much to the United States when relying upon a release as to a private litigant, for "The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in

that behalf." *United States* v. *Bostwick*, 94 U. S. 53, 66, 24 L. ed. 65, 66. Compare the cases, *ante*, —, holding that the United States in its contractual relations is subject to the rule as to duress. In addition, the jurisdictional act in the present case is similar to that in the case of the Mille Lac Band of Chippewa Indians, which, it was held (while making no admission of liability), "provides • • • for the adjudication of the claim according to *applicable legal principles.*" *United States* v. *Mille Lac Band of Chippewa Indians*, 229 U. S. 498, 500, 57 L. ed. 1299, 1302. [Italics ours.]

In *Wheeler* v. *Smith, et al., ante*, the case was this: Property which had been devised in trust for public purposes was claimed by the nephew and heir at law of the testator on the ground that the devise was invalid. The executors, who were men of high character in whom the claimant reposed confidence, represented that they had been advised by counsel that the devise was valid. A settlement was arrived at under which $25,000 was paid for a release of the claim. Subsequently the heir brought suit, reasserting his claim to the property and praying that the release be set aside because of his inexperience and lack of information as compared with the executors and because of the trust he reposed in them and his need for money at the time. This Court held the release to be void, saying:

> "The complainant, it seems, had studied law, but it is manifest from the facts before us that he was but little acquainted with business, was an inefficient and dependent man, easily misled, especially by those for whose abilities and characters he entertained a profound respect. • • •
>
> "But in making the compromise, the parties did not stand on equal ground. The necessities and character of the complainant were well known to the executors. • • •

> "• • • The influences operating upon the mind of the complainant induced him to sacrifice his interests. He did not act freely, and with a proper understanding of his rights." 9 How. 82, 13 L. ed. 55-56.

That the influences which induced the complainant to sacrifice his interests without a proper understanding of his rights were the result of the unequal positions of the parties and not of any wrongdoing on the part of the executors is made plain by the Court:

> "From the high character of the executors, no one can impute to them any fraudulent intent in this transaction. Looking to what they considered to be the object of the testator, they felt themselves authorized, if not bound, to effectuate his purposes by making this compromise with his heir at law. They had no personal interest beyond that which was common to the citizens of Alexandria." 9 How. 82, 13 L. ed. 55.

In *Thorn Wire Hedge Co.* v. *Washburn & Moen Mfg. Co.*, *ante*, while the rule was not applied because "the parties, • • • stood upon an equal footing," 159 U. S. 443, 40 L. ed. 212, the opinion states:

> "It has often been held that where the party executing the release, by reason of youth or advanced age, was incapacitated to act judiciously, or where the release was executed during the existence of fiduciary relations, calculated to beget unquestioning confidence, courts of equity will grant relief where the consideration was plainly inadequate." 159 U. S. 443, 40 L. ed. 212.

Certainly the average Indian is as much "incapacitated to act judiciously" as a person of immature or advanced age.

A familiar application of the rule is in the case of releases by seamen of claims for wages and for injuries. "Receipts or releases given by seamen, even with all the solemnity of sealed instruments, will have no effect beyond

the actual consideration fairly paid." *The Rajah*, Case No. 11538, 20 Fed. Cas. 193. Also, *Brown* v. *Lull*, Case No. 2018, 4 Fed. Cas. 407, 409, 410; *The David Pratt*, Case No. 3597, 7 Fed. Cas. 23, 24, 25; *Harden* v. *Gordon*, Case No. 6047, 11 Fed. Cas. 480, 485; *The Ringleader*, Case No. 11850, 20 Fed. Cas. 818; *Harmon* v. *United States*, 59 F. 2d 372, 373.

In *Harden* v. *Gordon*, Mr. Justice Story stated the reason for the rule in language applicable as much to Indians as to seamen:

> "• • • Every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying; and are easily overreached. But courts of maritime law have been in the constant habit of extending towards them a peculiar, protecting favor and guardianship. They are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner, as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and *cestuis que* trust with their trustees. They are considered as placed under the dominion and influence of men, who have naturally acquired a mastery over them; and as they have little of the foresight and caution belonging to persons trained in other pursuits of life, the most rigid scrutiny is instituted into the terms of every contract, in which they engage. *If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on the one side which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transaction, is that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and that pro tanto the bargain ought to be set aside as inequitable.*" 11 Fed. Cas. 485. [Italics ours.]

It follows, regardless of any other ground, that because of the unequal positions of the parties and the grossly inadequate consideration the release in the present case is not a bar to a determination of the claim on the merits.

This proposition imputes no wrong to the Congress in proposing to the Indians a settlement of their claim for $108,750. The presumption must be that both the Congress and the Indians were ignorant of the real value of the 87,000 acres.

Point III.

For their estate in the 87,000 acres of which they were deprived by the conveyance to the California & Oregon Land Company the Klamath Indians are entitled to just compensation as for a taking under the power of eminent domain, namely, the value of their estate at the date of the taking plus interest from that date to the date of payment.

1. The taking in this case was not a wrongful appropriation by an officer or agent of the United States but, as before stated, was duly authorized by act of Congress. *Ante*, 7.

It is now settled that, regardless of whether condemnation proceedings are instituted or not, when property is taken for public use under authority of an act of Congress there arises an implied promise on the part of the United States, enforceable by suit in the Court of Claims or the District Court, to pay the owner the just compensation provided for by the Fifth Amendment, and that in arriving at just compensation when payment is deferred there must be added to the value of the property at the time of the taking interest from that date to the date of payment so as to put the owner where he would have been if payment had been made at the time of the taking. *Seaboard Air*

Line Co. v. *United States,* 261 U. S. 299, 67 L. ed. 664; *Campbell* v. *United States,* 266 U. S. 368, 69 L. ed. 328; *Phelps* v. *United States,* 274 U. S. 341, 71 L. ed, 1083; *International Paper Co.* v. *United States,* 282 U. S. 399, 75 L. ed. 410; *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 75 L. ed. 473; *Jacobs* v. *United States,* 290 U. S., 13, 78 L. ed. 142.

It is also settled that this rule applies to the property of an Indian tribe where the tribe has been authorized to sue the United States, as here. *Cherokee Nation* v. *Southern Kansas R. R. Co.,* 135 U. S. 641, 34 L. ed. 295; *United States* v. *Mille Lac Band of Chippewa Indians,* 229 U. S. 498, 57 L. ed. 1299; *Yankton Sioux Tribe of Indians* v. *United States,* 272 U. S. 351, 71 L. ed. 294.

In *Yankton Sioux Tribe of Indians* v. *United States,* the case was as follows: The Indians had ceded to the United States 150,000 acres of land, and the United States in part consideration agreed that upon a certain condition a tract of 648 acres known as the Pipe Stone Reservation should become the property of the Indians in fee simple. Although, as claimed by the Indians, the condition happened, causing the title to the tract to vest in them, officers of the United States, under authority of an act of Congress, took possession of it for another purpose. Thereafter, another act of Congress, c. 222, 41 Stat. 738, similar to the jurisdictional act in the present case, authorized the Indians to bring suit in the Court of Claims to determine what their interest in the tract was and to recover whatever amount was legally or equitably due from the United States.

It was held that ownership of the tract had become vested in the Indians in fee simple and that they were "entitled to just compensation *as for a taking under the power of eminent domain.*" 272 U. S. 359, 71 L. ed. 298. [Italics ours.]

While in that case the property taken was owned by the Indians in fee simple, the decision could not have been different had their interest been a lesser one, since, of course, the right to just compensation as for a taking under the power of eminent domain cannot be made to depend upon the extent of the interest taken.

Indeed, it has been expressly decided that as regards their status under the Constitution there is no difference between Indian tribes which hold their lands under a fee simple title and those which hold under an exclusive right of occupancy. *United States* v. *Sandoval*, 231 U. S. 28, 48, 58 L. ed. 107, 115, and cases there cited.

In *United States* v. *Mille Lac Band of Chippewa Indians*, the Government had contended that certain resolutions of Congress under which rights of the Indians had been taken were passed in the exercise of the plenary power of Congress to govern the Indian tribes and that hence there was no liability for just compensation, citing *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 47 L. ed. 183, and *Lone Wolf* v. *Hitchcock*, 187 U. S. 656, 47 L. ed. 306. But this Court held otherwise, saying:

> "• • • The resolutions, unlike the legislation sustained in *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 307, 47 L. ed. 183, 190, 23 Sup. Ct. Rep. 115, and *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 564, 568, 47 L. ed. 299, 305, 307, 23 Sup. Ct. Rep. 216, were not adopted in the exercise of the administrative power of Congress over the property and affairs of dependent Indian wards, but were intended to assert, and did assert, an unqualified power of disposal over the lands as the absolute property of the government." 229 U. S. 509-510, 57 L. ed. 1306.

2. In the Court below the Government did not dispute the proposition that an Indian tribe whose property has been taken for a public use under authority of an act of Con-

gress is entitled to just compensation under the Fifth Amendment as for a taking under the power of eminent domain, but maintained that because the Act of June 21, 1906, authorized the Secretary of the Interior upon taking the 87,000 acres to convey them to a private corporation the taking was for a private and not a public use and therefore not a taking under the power of eminent domain, so that interest as an element of just compensation would not be allowable.

Persons whose property is authorized to be taken by an act of Congress may contest the taking on the ground that it is not for a public use. But it is a novelty to find the United States as a litigant in its own courts contending that where property has been taken by its officers or agents by express direction of an act of Congress the taking was *not* for a public use.

The short answer is that the law officers of the United States will not be heard to make any such contention. They are estopped by the decision of Congress that the taking *was* for a public use, whether expressly declared or implied from the authorization to take.

Compare *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 335, 37 L. ed. 463, 471, holding that where a dam in a river had been built with the approval of Congress, even Congress itself is estopped from ordering the removal of the dam as an obstruction to navigation, although, of course, the dam could be taken under the power of eminent domain,—a ruling approved in *Greenleaf-Johnson Lumber Co.* v. *Garrison*, 237 U. S. 251, 264, 59 L. ed. 939, 946; *Lewis Blue Point Oyster Cultivation Co.* v. *Briggs*, 229 U. S. 82, 89, 57 L. ed. 1083, 1086; *Omnia Commercial Co.* v. *United States*, 261 U. S. 502, 513, 67 L. ed. 773, 777.

Let it be assumed, however, that the question is open to the same extent as if raised by the person whose property has been taken.

Even in that case the decision of Congress as to what is a public use, whether expressly declared or implied from the authorization to take, "is entitled to deference until it is shown to involve an impossibility." *Old Dominion Land Co.* v. *United States*, 269 U. S. 55, 66, 70 L. ed. 162, 165; also *United States* v. *Gettysburg Electric Ry. Co.*, 160 U. S. 668, 680, 40 L. ed. 576, 581.

There is, of course, no rigid test that can be applied in such cases. Any use necessary or appropriate in the execution of the powers granted Congress by the Constitution is a public use. *United States* v. *Gettysburg Electric Ry. Co.*, 160 U. S. 668, 679, 40 L. ed. 576, 580.

Use by the general public is not the test. *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U. S. 30, 32, 60 L. ed. 507, 511; *Strickley* v. *Highland Boy Gold Mining Co.*, 200 U. S. 527, 531, 50 L. ed. 581, 583.

Nor is the taking any less a taking for a public use because, as the Government argued below, the property taken is at once transferred to private persons or corporations, so long as the purpose to be accomplished is within the scope of the legislative power. *Internat. Paper Co.* v. *United States*, 282 U. S. 399, 408, 75 L. ed. 410, 414.

Furthermore, as Congress has the most extensive powers under the Constitution to legislate for the government of the Indian tribes and the regulation of their affairs, its discretion in exercising the power of eminent domain is at its widest in that field. *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S. 641, 656-657, 34 L. ed. 295, 302.

Applying these principles to the present case, 111,385 acres of land within the admitted boundaries of the Klamath Reservation had been conveyed away by patents issuing from the Department of the Interior as the result of mistake or fraud, and suits by the United States to recover this tract had been unsuccessful. *Ante*, 3. These were

lands which in part had been allotted to members of the Klamath Tribes in severalty and on which they were living, *ante*, 3, and, as reported to Congress by the Secretary of the Interior, they "complained bitterly," *ante*, 3.

It seems too plain for argument that procuring the return of these lands and removing this cause of bitterness in the relations between the Indians of the Klamath Reservation and the United States was not only an object within the scope of the powers of Congress in respect of the Indian tribes and their relations with the United States but was the positive duty of Congress as the guardian of its Indian wards.

This being so it follows that the taking of the 87,000 acres from another part of the reservation, unallotted, to be given in exchange for the 111,385-acre tract, was for a public use.

3. Nor was the taking any the less a taking under the power of eminent domain because the act of Congress did not in terms make provision for just compensation.

Immediately upon a taking of private property for a public use under authority of an act of Congress an implied promise to pay just compensation arises. *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 656, 28 L. ed. 846, 850; *United States* v. *Lynah*, 188 U. S. 445, 465, 47 L. ed. 539, 546-547; *United States* v. *Cress*, 243 U. S. 316, 329, 61 L. ed. 746, 753; *Bothwell* v. *United States*, 254 U. S. 231, 233, 65 L. ed. 238, 239; *Campbell* v. *United States*, 266 U. S. 368, 370-371, 69 L. ed. 328, 330; *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 489, 75 L. ed. 473, 476; *Jacobs* v. *United States*, 290 U. S. 13, 16, 78 L. ed. 142, 144.

This without more meets the constitutional requirement for just compensation. "• • • the duty to provide for payment of compensation may be adequately fulfilled by an assumption on the part of the government of the duty to

make prompt payment of the ascertained compensation,—that is, by the pledge, either expressly or by necessary implication, of the public good faith to that end." *Crozier* v. *Fried. Krupp Aktiengesellschaft*, 224 U. S. 290, 306, 56 L. ed. 771, 777.

Nor need the implied promise be coupled with the privilege of suing the United States, for "it is to be assumed that the United States is incapable of bad faith," *Great Falls Mfg. Co.* v. *Garland, Atty. Genl.*, 124 U. S. 581, 599, 31 L. ed. 527, 533,—that Congress "will be faithful to its duty under the Constitution," *Downes* v. *Bidwell*, 182 U. S. 244, 344, 45 L. ed. 1088, 1128.

Only if the implied promise should be repudiated would there be any ground to argue that there was no provision for just compensation and therefore a wrongful taking. "And withdrawal of all remedy, administrative as well as legal, would not necessarily imply repudiation. So long as the contractual obligation is recognized, Congress may direct its fulfillment without the interposition of either a court or an administrative tribunal." *Lynch* v. *United States*, 292 U. S. 571, 582, 78 L. ed. 1434, 1442.

So, in the case of the *Yankton Sioux Tribe of Indians* v. *United States*, 272 U. S. 351, 71 L. ed. 294, *ante*, 35, the taking was held to be a taking under the power of eminent domain although the act of Congress authorizing the taking made no provision for determining just compensation, and no right to sue the United States existed until the passage, subsequently, of the jurisdictional act, as in the present case.

4. The proposition that the Klamath Indians are entitled to recover, the value of the 87,000-acre tract taken from them in 1908, *with interest from that date to the date of payment*, as for a taking under the power of eminent domain, is not in conflict with the provision of § 3 of the juris-

dictional act that if it be determined that the Government "has wrongfully appropriated any lands belonging to the said Indians, damages therefor shall be confined to the value of the said land at the time of the said appropriation."

Property is not *wrongfully* appropriated by the Government when the officer taking it acts under legislative authority, *United States* v. *Buffalo Pitts Co.*, 234 U. S. 228, 234-235, 58 L. ed. 1290, 1293; and, as we have seen, the Secretary of the Interior in conveying to the California & Oregon Land Company the 87,000 acres within the boundaries of the Klamath Indian Reservation acted under the express authority of an act of Congress.

The case of *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330, 64 L. ed. 935, illustrates the difference between a wrongful appropriation of property and a taking under the power of eminent domain. The Commanding General of the Department of Alaska, without authority, took possession of a placer mining claim on the public lands as part of a site for an army post. Subsequently the Secretary of War, who alone had authority, under acts of Congress, to take land for such purposes, ratified the action of the Commanding General. This, it was held, converted what had been a wrongful appropriation into a taking under the power of eminent domain, the Court saying, "What he," the Commanding General, "had done before that date having been without authority, and hence *tortious*, created no liability on the part of the government." 253 U. S. 334, 64 L. ed. 937. [Italics ours.]

At the time the jurisdictional act was passed the Klamath Indians were asserting other claims besides this one. The claim most urged was that they had been deprived of many thousands of acres of land by an erroneous survey made by officers and agents of the United States of the boundaries

of their reservation as defined in the Treaty of October 14, 1864, *ante*, 11, —a claim asserted in another suit now pending in the Court of Claims, No. E-344. This *is* a case of wrongful appropriation, and as such comes within the operation of the measure of damages prescribed in § 3 of the jurisdictional act.

On the other hand, there is nothing in the jurisdictional act to indicate that Congress had any intention of diminishing the just compensation to which the Indians would be entitled under the Fifth Amendment for a taking of their property under the power of eminent domain.

Besides, Congress had no power to do any such thing, for "the right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest where such an allowance was appropriate in order to make the compensation adequate." *Jacobs* v. *United States*, 290 U. S. 13, 17, 78 L. ed. 142, 144.

Therefore, in order for § 3 to limit the amount recoverable to the value of the 87,000 acres at the time of the taking, to the exclusion of interest, it would have to be construed, *first*, as applicable not only to a "wrongful appropriation," in accordance with its terms, but to a taking under authority of an act of Congress in the exercise of the power of eminent domain, and *second*, as making the grant to the Klamath Indians of the privilege of suing the United States conditional upon the surrender of their constitutional right to interest as an element of just compensation.

As just shown, there is no warrant for such a construction. But even if the matter were doubtful such a construction must be rejected in conformity with the rule that—

> "Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution." *Phelps* v. *United States*, 274 U. S. 341, 344, 71 L. ed. 1083, 1085; *Russian Volunteer Fleet* v.

United States, 282 U. S. 481, 491, 75 L. ed. 473, 477; and *Jacobs* v. *United States*, 290 U. S. 13, 17, 78 L. ed. 142, 144.

A similar question came before this Court in a group of cases involving § 177 of the Judicial Code, U. S. C. A., Title 28, § 284, which prohibits the allowance of interest on any claim against the United States "up to the time of the rendition of judgment by the Court of Claims."

The question was whether this provision prevents the allowance of interest, prior to judgment, in suits against the United States on claims for just compensation for the taking of property under the power of eminent domain; in other words, whether the effect of this provision was to make the consent to sue the United States on such claims conditioned upon a surrender by the claimants of their right to interest as an element of just compensation.

The lower courts held that it did. *Liggett & Myers Tobacco Co.* v. *United States*, 61 Ct. Cl. 693, 703, 705; *Booth & Co.* v. *United States*, 61 Ct. Cl. 805, 816; *Phelps* v. *United States*, 61 Ct. Cl. 1044; *United States* v. *Jacobs*, 63 F. 2d 326.

In the case last cited the Circuit Court of Appeals said:

> "• • • And it is provided by statute that 'no interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest,' etc. Revised Statutes, § 1091; 28 U. S. C. A. § 284. This statute applies equally to District Courts exercising jurisdiction under the Tucker Act 'concurrent with the Court of Claims.' 28 U. S. C. A. § 41 (20). As the sovereign cannot be sued without its consent, it was competent for Congress in giving consent to suits against the United States upon private claims to impose the condition that such claims should not draw interest." 63 F. 2d, 327.

This Court reversed these decisions. *Liggett & Myers Tobacco Co.* v. *United States*, 274 U. S. 215, 71 L. ed. 1006; *Phelps* v. *United States*, 274 U. S. 341, 71 L. ed. 1082; *Jacobs* v. *United States*, 290 U. S. 13, 78 L. ed. 142. Citing and applying the rule above stated, that "Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution," it held that interest as an element of just compensation is not "interest" within the meaning of § 177 of the Judicial Code. *Phelps* v. *United States*, 274 U. S. 344, 71 L. ed. 1085; *Jacobs* v. *United States*, 290 U. S. 17, 78 L. ed. 144.

Again in *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 75 L. ed. 473, an alien friend, a corporation organized under the laws of Russia, brought suit in the Court of Claims to recover just compensation for the requisitioning, under authority of the Act of Congress of June 15, 1917, c. 29, 40 Stat. 183, of contracts for the construction of two ships. The property rights of alien friends are within the protection of the Fifth Amendment, 282 U. S. 489, 75 L. ed. 476. However, under § 155 of the Judicial Code, U. S. C. A., Title 28, § 261, only those aliens are authorized to sue the United States in the Court of Claims "who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts," 282 U. S. 488, 75 L. ed. 475, and it was *not* shown that citizens of the United States are entitled to prosecute claims against the government of Russia in the courts of that country, 282 U. S. 491, 75 L. ed. 477. So it was argued that the suit could not be maintained.

But as fulfillment of the requirements of § 155 of the Judicial Code was not specified as a condition of the right to sue under the Act of June 15, 1927, this Court refused to imply a condition that would have deprived the plaintiff of the

means of enforcing its constitutional right to just compensation for the taking of its property, 282 U. S. 491, 75 L. ed. 477, citing *Phelps* v. *United States*, 274 U. S. 341, 344, 71 L. ed. 1083, 1085, *ante*.

Similarly, even if § 3 of the jurisdictional act in this case were ambiguous and not in terms limited to *wrongful* appropriations of property, it would have to be construed so as not to exclude interest as an element of just compensation for the taking of property under the power of eminent domain.

5. It follows that the Klamath Indians are entitled to recover the value of their interest in the 87,000 acres at the date of the taking, July 26, 1906, Finding X, R. 24, to wit, $2,980,000, Finding XI, R. 24, plus interest at a proper rate from the date of the taking to the date of payment. In *Seaboard Air Line* v. *United States*, 261 U. S. 299, 306, 67 L. ed. 664, 670, this Court approved as the proper rate of interest in such a case the legal rate in the State in which the property taken was located. That would be six per cent in the present case. Oregon Laws (Olson), Vol. II, Title XLIII, c. VI, § 7988.

Point IV.

The Court of Claims in contravention of the jurisdictional act allowed as set-offs against the claim of the Klamath Tribes expenditures by the United States in fulfillment of its treaty obligations and expenditures not made for the benefit of the Tribes.

The jurisdictional act provides that in rendering judgment—

> "the United States shall be allowed credit for all sums, including gratuities, heretofore paid or expended for the benefit of said Indians or any band thereof." § 2.

There is a similar provision in nearly all of the later acts of Congress authorizing Indian tribes to sue the United States, and the accepted construction is that it refers to expenditures by the United States for the benefit of the Indians

> "*over and above* the disbursements made for their benefit in satisfaction of treaty or other legal obligations." *Blackfeet, etc. Tribes of Indians* v. *United States*, — Ct. Cl. —, decided December 4, 1933. [Italics ours.]

Therefore, expenditures which were not for the benefit of the Klamath Indians, or which, even if for their benefit, were in fulfillment of treaty or other legal obligations of the United States, are not allowable as set-offs under the jurisdictional act.

And if an expenditure for a purpose stipulated in a treaty is alleged to be in excess of what was required to comply with the treaty the findings of fact must show the amount of the excess in order for the United States to claim it as a set-off. *United States* v. *Blackfeather*, 155 U. S. 180, 39 L. ed. 114.

In the case cited the United States had undertaken in a treaty with the Shawnees to support and keep a blacksmith for the use of the Indians "for the term of five years, or as long as the President may deem it advisable," and to furnish tools for the blacksmith shop and three hundred pounds of iron annually. 155 U. S. 187, 39 L. ed. 117. It was found that the Shawnees had been paid for blacksmiths from 1824 to 1854 the sum of $17,408.73. *Ibid.* The Court held:

> "As there is no finding how much of this sum was expended during the five years, or the extended period deemed 'advisable' by the President, during which the Government was bound to keep up the blacksmith's

shop, the finding is too indefinite to be made the subject of a set-off." 155 U. S. 187, 39 L. ed. 117.

The set-offs claimed by the United States in the present case were enumerated in its Request for Findings of Fact in the Court below, XIV, XV, XVI, XVII, XVIII, pp. 851-857, a certified copy of which has been filed with the Clerk of this Court.[1]

Petitioners in their motion for a new trial and amended findings requested the Court below to set forth in its findings the items of expenditure claimed as set-offs by the United States, but it set forth only the rejected items, lumping together the allowed items aggregating $1,978,431.24. Finding XXI, R. 28.

However, by comparing the rejected items with the items claimed by the United States in its Request for Findings of Fact, the allowed items are readily ascertainable. They include the following, the allowance of which was assigned as error in the petition for certiorari:

1. Agency buildings, two items, $1,545.51 and $8,832.83; incidental agency expenses, two items, $10,032.94 and $11,189.29; pay of subagents, $83.33; pay of Indian agents, two items, $16,956.04 and $17,846.72; pay of interpreters, two items, $14,593.41 and $2,997.66; pay of miscellaneous employees, two items, $40,848.75 and $333,871.16; pay of judges, Indian courts, $3,662.79; pay of matrons, $7,056.00; pay and equipment of Indian police, two items, $11,533.92 and $84,992.56; in all, $566,042.91. Government's Request for Findings of Fact, XIV, XV, pp. 751, 753.

2. Indian school and agency buildings, $70,281.22. *Ibid.*, XV, p. 754.

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[1] The request for findings of fact is included in a document entitled: "Defendant's Objections to Findings of Fact Requested by Plaintiffs, Request for Findings of Fact, Brief, and Appendix.

3. Erection and repair of sawmill, $6,671.25. *Ibid.*, XV, p. 754.

4. Transportation by carrier, two items, $56,309.60, *Ibid*, XIV, p. 752, and $110,537.95, *Ibid.*, XV, p. 754, in all, $166,847.55, less $89,277.95, conceded by the Government to have been erroneously included, Supp. Br., Court of Claims, p. 915.

5. Education of children of the Klamath Tribes at schools off the Reservation, $269,746.00, Government's Request for Findings of Fact, XVII, p. 756, less $45,723.09, conceded by the Government to have been erroneously included, Supp. Br., Court of Claims, p. 918.

1. All the items of this group are expenditures for essentially governmental purposes—administration, enforcement of the laws, and police.

This Court has repeatedly laid down the rule that in view of the very great disadvantages under which the Indian tribes labor in negotiating and drawing up treaties the provisions of such a treaty must be construed "in the sense in which they would naturally be understood by the Indians." *Jones* v. *Meehan*, 175 U. S. 1, 11, 44 L. ed. 49, 54, and other cases previously cited, *ante*, 30.

It is a challenge to reason to say that the Klamath Indians would naturally have understood their treaty with the United States to charge them, either certainly or contingently by way of set-off should they have any claims against the United States, with expenditures made by the United States for the essential purposes of Government in the area within their reservation.

On the contrary one would suppose that aside from the obligations resting upon the United States as sovereign there would arise out of the Treaty itself, that is, from the requirement that the Indians should "acknowledge their

dependence upon the Government of the United States, * * * and submit to and obey all laws and regulations which the United States may prescribe for their government and conduct," Article IX, 16 Stat. 709, a reciprocal obligation on the part of the United States to provide for such essential services of government as administration, enforcement of the laws, and police.

This construction is further borne out by the reference in the Treaty to "the Superintendent or Agent having charge of the tribes," and the provision "that no white person shall be permitted to locate or remain upon the reservation except the Indian Superintendent and Agent, employees of the Indian Department, and officers of the Army of the United States." Articles I, II, 16 Stat. 707-708.

That these provisions imposed upon the United States the obligation of maintaining an agency on the reservation for the purposes of administration is supported by the decision of the Comptroller of the Treasury of August 15, 1905, 12 Comp. Dec. 77, construing substantially similar provisions of the Treaty of 1868 with the Crow Indians, 15 Stat. 649, 650. The question there was whether disbursements for salaries of employees of the agency maintained on the Crow Reservation and for forage and fuel for the agency were in fulfillment of obligations of the United States under the Treaty of 1868. The Comptroller held that they were:

> "Articles III, IV and V of said Treaty of 1868 contemplated the maintenance by the United States of an Indian agency for the Crow Indians, and that the expenses incident thereto are to be paid by the United States. The agency expenses paid on vouchers 19, 34, 35 and 36 amounting to $2,067.97, were ordinary expenses pertaining to the agency, within the fourth condition of the agreement of 1880, as much so as the salary of the agent."

In addition the Treaty with the Klamath Tribes obligated the United States to expel all trespassers immediately and to secure to the Indians the exclusive right of fishing in the streams and lakes and of gathering edible roots, seeds and berries within the limits of the Reservation. *Ibid*, Article I.

How could this obligation be fulfilled without a police force? The need of a police force for this purpose was repeatedly stated in the reports of the Superintendent of the Klamath Reservation and the Commissioner of Indian Affairs. Rep. Supt., 1887, 50th Cong., 1st sess., House Exec. Docs., Serial 2542, p. 269; Rep. Supt., 1889, 51st Cong., 1st sess., House Exec. Docs., Serial 2725, p. 273; Rep. Comr., 1885, p. XXIII.

Apart, therefore, from the question whether in the broad sense the United States was not under a legal obligation to make these expenditures in discharge of its duties as sovereign, the Treaty itself, properly construed, obligated it to make them. It follows that they are not proper set-offs under the jurisdictional act.

2. Insofar as the expenditure of $70,281.22 was for the erection and repair of agency buildings, the United States was obligated to make it because, as we have just seen, *ante*, 49, Articles I and II of the Treaty contemplated that the United States would maintain a superintendent or agent on the Reservation for the purposes of administration. And since the findings do not show what part of the expenditure, if any, was for other purposes, no part of it can be claimed as a set-off, since, under the decision in the *Blackfeather Case* if an expenditure by the United States for a treaty purpose is alleged to be in excess of what was required to comply with the treaty the findings must show the amount of the excess in order for the United States to claim it as a set-off. *Ante*, 46.

Moreover, the United States was also obligated by Article IV of the Treaty to erect "the necessary buildings for one manual-labor school," and keep them in repair for the term of twenty years. *Post*, 63. True, as the Government will doubtless point out, there were two other items of expenditure for "erection and repair of manual-labor school," of $2,819.83 and $10,706.28, respectively. But the obligation of the United States did not end with the erection of one building or two buildings for the manual-labor school. The obligation was to erect "the *necessary* buildings" for the school, and there was no time limit after which the obligation lapsed except as to making repairs. The Government cannot claim any part of this expenditure as a set-off on the ground that it was made for repairs after the expiration of twenty years from the date of erection of the buildings because the findings do not show what part, if any, that was. *Blackfeather Case*, 155 U. S. 180, 39 L. ed. 114, *ante*, 46.

3. Article IV of the Treaty obligated the United States to erect a sawmill without any mention of time, and then to keep it in repair for a term of twenty years. *Post*, 63. While, as the Government will doubtless point out, there was an earlier expenditure of $548.11 said to have been for the erection and repair of a sawmill, this amount on its face was inadequate for the purpose unless this provision of the Treaty is to be construed so narrowly as to make it practically worthless. It follows that the expenditure of $6,671.25 for this purpose was in fulfillment of a treaty obligation and therefore not a proper set-off.

4. Transportation by carrier was required in the fulfillment of Articles IV and V of the Treaty in connection, among other things, with the erection and repair of buildings. The obligation to erect the specified buildings was not limited as to time. The hospital was not erected until 1901, Report, Commissioner of Indian Affairs 1901, 57th

Cong., 1st sess., Serial 4290, H. Doc., Vol. 23, p. 347, and the school buildings were to be erected as needed. Transportation was also required in bringing supplies to the Agency which the Government was under obligation to maintain.

The findings do not show that any part of this expenditure was for transportation not required in the fulfillment of these treaty obligations. It follows under the rule of the *Blackfeather Case, ante,* 46, that the whole of it must be regarded as having been made under the Treaty, and therefore no part of it is a proper set-off under the jurisdictional act.

5. As to the item of $269,746.00 for the education of children of the Klamath Tribes at schools off the Reservation, the question is whether the expenditure was "for the benefit of said Indians or any band thereof" within the meaning of the jurisdictional act.

Mark the language—"said Indians *or any band thereof.*" Petitioners contend that this means expenditures for the benefit of the Indians *as a tribe or band* and not as individuals, and that the expenditure in question was for the benefit of individual Indians.[1]

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[1] As a matter of fact the Indians of the Klamath Reservation were opposed to sending their children to schools off the Reservation. Reporting on that subject the Superintendent of the Klamath Reservation stated: "The experience of the people here, and no doubt, it has been similar on other reservations, has been such in sending their children off to training schools, that they cannot be blamed for being prejudiced against them. It is an indisputable fact that of all the Indian children that have been taken away from this reservation to training schools, two-thirds of them are now dead, most of them having died at the schools to which they were taken, but some coming home to die." Report, Commissioner of Indian Affairs, 1892, 52d Cong., 2d sess., House Exec. Docs., Serial 3088, p. 412.

This was the position of the Court of Claims until recently. In *Osage Tribe of Indians* v. *United States*, 66 Ct. Cl. 64, the Court held that "expenditures for education of individual Indians at schools" were not proper set-offs under a provision of the jurisdictional act authorizing "any legal or equitable set-offs or counter-claims, including gratuities, which the United States Government may have against the said Osage Tribe of Indians." The opinion states:

> "It may, however, be well to state that as to the counter-claims the special act directed consideration only to counterclaims against the Osage Tribe and not against individuals of the Tribe. In this view of the matter, counter-claims Nos. 8 and 9, being for expenditures for education of individual Indians at schoools, are not within the meaning of the special act, and could not be considered in any event as an offset against the Osage Indians as a tribe." 66 Ct. Cl. 82.

Again, in *Fort Berthold Indians* v. *United States*, 71 Ct. Cl. 308, where the jurisdictional act provided that "the United States shall be allowed credit for all sums heretofore paid or expended for the benefit of said Tribe or any band thereof," the Court, refusing to allow as a set-off "the cost of educating individual children of the bands at various non-agency Indian schools," said:

> "The sums chargeable, we think, must be restricted to the usually recognized and customary distributions made to the Indians as *tribes and bands* unless a contrary purpose is expressed in the act." P. 341. [Italics ours.]

But in *Blackfeet, etc., Tribes of Indians* v. *United States*, — Ct. Cl. —, decided December 4, 1933, where the jurisdictional act authorized "any legal or equitable defenses, setoffs, or counterclaims, including gratuities, which the United

States may have against the said Nations or Tribes," the court held that the "expense incurred in sending children to nonagency schools" *was* a proper set-off.

The Court attempted to distinguish the *Fort Berthold Case* on the ground that the jurisdictional act in that case did not authorize gratuities to be set-off, as it did in the *Blackfeet Case*. This, however, does not meet the Court's reasoning in the earlier cases that only expenditures for the benefit of the Indians *as tribes or bands*, whether gratuities or what not, came within the set-off provision. Besides, the set-off provision in the *Osage Case*, as in the *Blackfeet Case*, expressly included gratuities. *Ante*, 53.

We maintain that the earlier decisions of the Court of Claims on this point were right and that consequently the expenditure of $269,746.00 for the education of children of the Klamath Tribes at schools off the Reservation was not a proper set-off under the jurisdictional act.

It is a harsh thing at best for the United States to cancel in whole or in part its just debt to an Indian tribe by taking back—or setting off as it is euphoniously called—absolute and unconditional gifts made to the tribe in all the years of the past as a condition of permitting the tribe to sue for the debt. Certainly such a policy should be carried no further than the statute clearly requires.

Conclusion.

The judgment of the Court of Claims should be reversed, with instructions to enter judgment for petitioners for the value of their estate in the 87,000 acres at the time of the taking, as heretofore found by the Court, together with interest at the rate of six per cent per annum from the date of the taking until the date of payment, less the $108,750 already paid, and less also the set-offs found by the Court to be chargeable against the petitioners under the jurisdic-

tional act corrected so as to exclude expenditures for administration, enforcement of the law and police, for Indian school and agency buildings, for the erection and repair of a sawmill, for transportation by carrier, and for education of Indian children at schools off the Reservation.

Respectfully submitted,

G. CARROLL TODD,
Counsel for Petitioners.

DANIEL B. HENDERSON,
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JOHN IRWIN,
T. HARDY TODD,
Of Counsel.

Appendix.

JURISDICTIONAL ACT, MAY 26, 1920, C. 203, 41 STAT. 623.

An Act authorizing certain tribes of Indians to submit claims to the Court of Claims, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all claims of whatsoever nature which the Klamath and Modoc Tribes of Indians and the Yahooskin Band of Snake Indians, parties to the treaty with the United States, concluded October 14, 1864 (Sixteenth Statutes at Large, page 707), may have against the United States, which have not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said Indians from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds of said Indians, or for the failure of the United States to pay said Indians any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims, with the right of either party to appeal to the Supreme Court of the United States, to hear and determine all legal and equitable claims, if any, of said Indians, against the United States, and to enter judgment thereon.

Sec. 2. That if any claim or claims be submitted to said courts they shall settle the rights therein, both legal and equitable, of each and all the parties thereto notwithstanding lapse of time or statutes of limitation, and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions, and the United States shall be allowed credit for all sums, including gratuities, heretofore paid or expended for the benefit of said Indians or any band thereof. The claim or claims of the Indians, or band or bands thereof, may be presented separately or jointly by petition, subject, however, to amendment; suit

to be filed within five years after the passage of this Act, and such action shall make the petitioner or petitioners party plaintiff or plaintiffs and the United States party defendant; and any band or bands of said Indians, or any other tribe or band of Indians the court may deem necessary to a final determination of such suit or suits, may be joined therein as the court may order. Such petition, which shall be verified by the attorney or attorneys employed by said Indians, or any bands thereof, shall set forth all the facts on which the claims for recovery are based, and said petition shall be signed by the attorney or attorneys employed, and no other verification shall be necessary. Official letters, papers, documents, and public records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said Indians or bands thereof to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys for said Indians or bands of Indians.

Sec. 3. That if it be determined by the Court of Claims in the said suit herein authorized that the United States Government has wrongfully appropriated any lands belonging to the said Indians, damages therefor shall be confined to the value of the said land at the time of said appropriation, and the decree of the Court of Claims with reference thereto, when satisfied, shall annul and cancel all claim and title of the said Indians or any other tribe or band of Indians in and to said lands, as well as all damages for all wrongs and injuries, if any, committed by the Government of the United States with reference thereto.

Sec. 4. That upon the final determination of such suit, cause, or action, the Court of Claims shall decree such fees as it shall find reasonable to be paid the attorney or attorneys employed therein by said Indians or bands of Indians, under contracts negotiated and approved as provided by existing law, and in no case shall the fee decreed by said Court of Claims be in excess of the amounts stipulated in the contracts approved by the Commissioner of Indian Affairs and the Secretary of the Interior, and no at-

torney shall have a right to represent the said Indians or any band thereof in any suit, cause, or action under the provisions of this Act until his contract shall have been approved as herein provided. The fees decreed by the court to the attorney or attorneys of record shall be paid out of any sum or sums recovered in such suits or actions, and no part of such fee shall be taken from any money in the Treasury of the United States belonging to such Indians or bands of Indians in whose behalf the suit is brought unless specifically authorized in the contract approved by the Commissioner of Indian Affairs and the Secretary of the Interior as herein provided: *Provided*, That in no case shall the fees decreed by said court amount to more than 10 per centum of the amount of the judgment recovered in such cause.

ACT OF JUNE 21, 1906, C. 3504, 34 STAT. 325, 368.

* * * * * * *

That the Secretary of the Interior be, and is hereby, authorized, in his discretion, to exchange the whole of the odd numbered sections and parts thereof in the Klamath Indian Reservation in the State of Oregon, now held in private ownership under the final decree and decision of the Supreme Court of the United States, affirming the title of the California and Oregon Land Company thereto, in the suit of the United States against said company as reported in volume one hundred and ninety-two, at page three hundred and fifty-five, of the decisions of said court, and aggregating one hundred and eleven thousand three hundred and eighty-five acres, for other lands not exceeding eighty-seven thousand acres, situate in one or more compact bodies, in townships thirty-one and thirty-two south, of ranges eleven, twelve, and thirteen east in said reservation, said lands so taken in exchange to be selected, subject to the approval of the Secretary of the Interior; and in order to facilitate such exchange and the development of the lands to be so taken thereunder there may also be

selected in like manner and as part of the quantity aforesaid other lands in said reservation for the location, construction, and operation of mills and power plants, and with the right to construct railroads, dams, reservoirs, and power-transmission lines, subject to the provisions of existing law and such rules and regulations as the Secretary of the Interior may prescribe thereunder. And when such exchange is effected patents for the lands so selected and approved shall issue therefor.

* * * * * * *

ACT OF APRIL 30, 1908, C. 153, 35 STAT. 70, 92.

* * * * * * *

That there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred and eight thousand seven hundred and fifty dollars, or so much thereof as may be necessary, to pay the Indians of the Klamath agency for the lands conveyed to the California and Oregon Land Company, in accordance with the provisions of the Act of June twenty-first, nineteen hundred and six (Thirty-fourth Statutes at Large, pages three hundred twenty-five and three hundred sixty-eight), said sum to be deposited in the Treasury of the United States to the credit of said Indians and expended for their benefit in such manner and for such purposes as the Secretary of the Interior may prescribe: *Provided*, That this appropriation shall not be effective until said Indians, through the usual channels, shall execute a release of any claims and demands of every kind against the United States for the land involved.

* * * * * * *

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE KLAMATH AND MOADOC TRIBES AND YAHOOSKIN BAND OF SNAKE INDIANS: CONCLUDED, OCTOBER 14, 1864; RATIFICATION ADVISED, WITH AMENDMENTS, JULY 2, 1866; AMENDMENTS ASSENTED TO, DECEMBER 10, 1869; PROCLAIMED, FEBRUARY 17, 1870. 16 STAT. 707.

ULYSSES S. GRANT, PRESIDENT OF THE UNITED STATES OF AMERICA,

To all and singular to whom these presents shall come, greeting:

Whereas a treaty was made and concluded at Klamath lake, in the State of Oregon, on the fourteenth day of October, in the year of our Lord one thousand eight hundred and sixty-four, by and between J. W. Perit Huntington and William Logan, commissioners on the part of the United States, and La-Lake, Chil-o-que-nas, and other chiefs and headmen of the Klamath tribe of Indians; Schon-chin, Stak-it-ut, and other chiefs and headmen of the Moadoc tribe of Indians, and Kile-to-ak and Sky-te-ock-et, chiefs and headmen of the Yahooskin band of Snake Indians, respectively, on the part of said tribes and band of Indians, and duly authorized thereto by them, which treaty is in the words and figures following, to wit:

Articles of agreement and convention made and concluded at Klamath lake, Oregon, on the fourteenth day of October, A. D. one thousand eight hundred and sixty-four, by J. W. Perit Huntington, superintendent of Indian affairs in Oregon, and William Logan, United States Indian agent for Oregon, on the part of the United States, and the chiefs and headmen of the Klamath and Moadoc tribes, and Yahooskin band of Snake Indians, hereinafter named, to wit: La-Lake, Chil-o-que-nas, Kellogue, Moghen-kas-kit, Blow, Le-lu, Palmer, Jack, Que-as, Poosak-sult, Che-mult, No-ak-sum, Mooch-kat-allick, Toontuck-te, Boos-ki-you, Ski-a-tic, Shol-las-loos, Ta-tet-pas, Muk-has, Herman-koos-mam, chiefs and headmen of the Klamths, Schon-chin, Stak-it-ut, Keint-poos, Chuck-e-iox, chiefs and headmen of the Moadocs, and Kile-to-ak and Sky-te-ock-et, chiefs of the Yahooskin band of Snakes.

Article I. The tribes of Indians aforesaid cede to the United States all their right, title, and claim to all the country claimed by them, the same being determined by the following boundaries, to wit: Beginning at the point where the forty-fourth parallel of north latitude crosses the summit of the Cascade mountains; thence following the main dividing ridge of said mountains in a southerly direction to the ridge which separates the waters of Pitt and McCloud rivers from the waters on the north; thence along said dividing ridge in an easterly direction to the southern end of Goose lake; thence northeasterly to the northern end of Harney lake; thence due north to the forty-fourth parallel of north latitude; thence west to the place of beginning: *Provided,* That the following described tract, within the country ceded by this treaty, shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians, [and] held and regarded as an Indian reservation, to wit: Beginning upon the eastern shore of the middle Klamath lake, at the Point of Rocks, about twelve miles below the mouth of Williamson's river; thence following up said eastern shore to the mouth of Wood river; thence up Wood river to a point one mile north of the bridge at Fort Klamath; thence due east to the summit of the ridge which divides the upper and middle Klamath lakes; thence along said ridge to a point due east of the north end of the upper lake; thence due east, passing the said north end of the upper lake, to the summit of the mountains on the east side of the lake; thence along said mountain to the point where Sprague's river is intersected by the Ish-tish-ea-wax creek; thence in a southerly direction to the summit of the mountain, the extremity of which forms the Point of Rocks; thence along said mountain to the place of beginning. And the tribes aforesaid agree and bind themselves that, immediately after the ratification of this treaty, they will remove to said reservation and remain thereon, unless temporary leave of absence be granted to them by the superintendent or agent having charge of the tribes.

It is further stipulated and agreed that no white person shall be permitted to locate or remain upon the reservation,

except the Indian superintendent and agent, employes of the Indian department, and officers of the army of the United States, *guaranteed* [and] that in case persons other than those specified are found upon the reservation, they shall be immediately expelled therefrom; and the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits, is hereby secured to the Indians aforesaid: *Provided, also,* That the right of way for public roads and railroads across said reservation is *guaranteed* [reserved] to citizens of the United States.

Article II. In consideration of and in payment for the country ceded by this treaty, the United States agree to pay to the tribes conveying the same the several sums of money hereinafter enumerated, to wit: Eight thousand dollars per annum for a period of five years, commencing on the first day of October, eighteen hundred and sixty-five, or as soon thereafter as this treaty may be ratified; five thousand dollars per annum for the term of five years next succeeding the first period of five years; and three thousand dollars per annum for the term of five years next succeeding the second period; all of which several sums shall be applied to the use and benefit of said Indians by the superintendent or agent having charge of the tribes, under the direction of the President of the United States, who shall, from time to time, in his discretion, determine for what objects the same shall be expended, so as to carry out the design of the expenditure, [it] being to promote the well-being of the Indians, advance them in civilization, and especially agriculture, and to secure their moral improvement and education.

Article III. The United States agree to pay said Indians the additional sum of thirty-five thousand dollars, a portion whereof shall be used to pay for such articles as may be advanced to them at the time of signing this treaty, and the remainder shall be applied to subsisting the Indians during the first year after their removal to the reservation, the purchase of teams, farming implements, tools,

seeds, clothing, and provisions, and for the payment of the necessary employes.

Article IV. The United States further agree that there shall be erected at suitable points on the reservation, as soon as practicable after the ratification of this treaty, one saw-mill, one flouring-mill, suitable buildings for the use of the blacksmith, carpenter, and wagon and plough maker, the necessary buildings for one manual-labor school, and such hospital buildings as may be necessary, which buildings shall be kept in repair at the expense of the United States for the term of twenty years; and it is further stipulated that the necessary tools and material for the saw-mill, flour-mill, carpenter, blacksmith, and wagon and plough maker's shops, and books and stationery for the manual-labor school, shall be furnished by the United States for the period of twenty years.

Article V. The United States further engage to furnish and pay for the services and subsistence, for the term of fifteen years, of one superintendent of farming operations, one farmer, one blacksmith, one sawyer, one carpenter, and one wagon and plough maker, and for the term of twenty years of one physician, one miller, and two school-teachers.

Article VI. The United States may, in their discretion, cause a part or the whole of the reservation provided for in Article I to be surveyed into tracts and assigned to members of the tribes of Indians, parties to this treaty, or such of them as may appear likely to be benefited by the same, under the following restrictions and limitations, to wit: To each head of a family shall be assigned and granted a tract of not less than forty nor more than one hundred and twenty acres, according to the number of persons in such family; and to each single man above the age of twenty-one years a tract not exceeding forty acres. The Indians to whom these tracts are granted are guaranteed the perpetual possession and use of the tracts thus granted and of the improvements which may be placed thereon; but no Indian shall have the right to alienate or convey any such

tract to any person whatsoever, and the same shall be forever exempt from levy, sale, or forfeiture: *Provided*, That the Congress of the United States may hereafter abolish these restrictions and permit the sale of the lands so assigned, if the prosperity of the Indians will be advanced thereby: *And provided further*, If any Indian, to whom an assignment of land has been made, shall refuse to reside upon the tract so assigned for a period of two years, his right to the same shall be deemed forfeited.

Article VII. The President of the United States is empowered to declare such rules and regulations as will secure to the family, in case of the death of the head thereof, the use and possession of the tract assigned to him, with the improvements thereon.

Article VIII. The annuities of the tribes mentioned in this treaty shall not be held liable or taken to pay the debts of individuals.

Article IX. The several tribes of Indians, parties to this treaty, acknowledge their dependence upon the government of the United States, and agree to be friendly with all citizens thereof, and to commit no depredations upon the person or property of said citizens, and to refrain from carrying on any war upon other Indian tribes; and they further agree that they will not communicate with or assist any persons or nation hostile to the United States, and, further, that they will submit to and obey all laws and regulations which the United States may prescribe for their government and conduct.

Article X. It is hereby provided that if any member of these tribes shall drink any spirituous liquor, or bring any such liquor upon the reservation, his or her proportion of the benefits of this treaty may be withheld for such time as the President of the United may direct.

Article XI. It is agreed between the contracting parties that if the United States, at any future time, may desire to locate other tribes upon the reservation provided for in this treaty, no objection shall be made thereto; but the

tribes, parties to this treaty, shall not, by such location of other tribes, forfeit any of their rights or privileges guaranteed to them by this treaty.

Article XII. This treaty shall bind the contracting parties whenever the same is ratified by the Senate and President of the United States.

In witness of which, the several parties named in the foregoing treaty have hereunto set their hands and seals at the place and date above written.

[Signatures.]

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the second day of July, one thousand eight hundred and sixty-six, advise and consent to the ratification of the same, with amendments, by a resolution in the words and figures following, to wit:

In Executive Session, Senate of the United States, July 2, 1866.

Resolved, (two thirds of the Senators present concurring,) That the Senate advise and consent to the ratification of the articles of agreement and convention made and concluded at Klamath Lake, Oregon, on the 14th of October, 1864, by the commissioners on the part of the United States and the Klamath and Moadoc tribes and Yahooskin band of Snake Indians, with the following

Amendments:

1st. Article 1, paragraph 2, line 3, strike out the word "guaranteed," and insert in lieu thereof the word *and.*

2d. Same article, same paragraph, line 7, strike out the word "guaranteed," and insert in lieu thereof the word *reserved.*

Attest: J. W. FORNEY,
Secretary.

And whereas, the foregoing amendments having been fully explained and interpreted to the chiefs and headmen of the aforementioned Klamath and Moadoc tribes and Yahooskin band of Snake Indians, whose names are hereinafter signed, they did, on the tenth day of December, one thousand eight hundred and sixty-nine, give their free and voluntary assent to the said amendments, in the words and figures following, to wit:

Whereas the Senate of the United States, in executive session, did, on the second day of July, A. D. 1866, advise and consent to the ratification of the articles of agreement and convention made and concluded at Klamath Lake, Oregon, on the 14th of October, 1864, by the commissioners on the part of the United States and the Klamath and Moadoc tribes and the Yahooskin band of Snake Indians, with the following amendments:

1st. Article 1, paragraph 2, line 3, strike out the word "guaranteed," and insert in lieu thereof the word *and*.

2d. Same article, same paragraph, line 7, strike out the word "guaranteed," and insert in lieu thereof the word *reserved*.

And whereas, the foregoing amendments have been fully interpreted and explained to the undersigned chiefs and headmen of the aforesaid Klamath and Moadoc tribes and Yahooskin band of Snake Indians, we do hereby agree and assent to the same.

Done at Klamath Agency, Oregon, on this tenth day of December, A. D. 1869.

In witness of which, the several parties named in the said treaty have hereunto set their hands and seals, at the place and date above written.

[Signatures.]

Now, therefore, be it known that I, Ulysses S. Grant, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the second of July, one thousand eight hundred and sixty-six, accept, ratify, and confirm the said treaty, with the amendments as aforesaid.

In testimony whereof, I have hereto signed my name, and caused the seal of the United States to be affixed.

Done at the city of Washington this seventeenth day of February, in the year of our Lord one thousand
[SEAL.] eight hundred and seventy, and of the Independence of the United States of America the ninety-fourth.

U. S. GRANT.

By the President:
HAMILTON FISH,
Secretary of State.

(6897-C)